1992

First Security Mortgage Company, a Utah corp. v. Salt Lake County, State of Utah; Salt Lake County Assessor, Robert L. Yates; Salt Lake County Treasurer, Arthur L. Monson : Reply Brief of Appellants

Utah Court of Appeals

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DOCKET NO. 920856 IN THE UTAH COURT OF APPEALS

FIRST SECURITY MORTGAGE COMPANY, a Utah Corp.	)	
Plaintiff/Appellee,	)	Case No. #920856-CA
v.	)	
SALT LAKE COUNTY, STATE OF UTAH; SALT LAKE COUNTY ASSESSOR, ROBERT L. YATES; SALT LAKE COUNTY TREASURER, ARTHUR L. MONSON,	)	Priority No. 15
Defendants/Appellants.	)	

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE PAT B. BRIAN, JUDGE

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Defendants/Appellants by their attorney, Mary Ellen Sloan, submit the following Reply Brief.

ARGUMENT

POINT I

THE GENERAL RULE IS THAT TAX OBLIGATIONS ARE NOT DISCHARGED UNTIL PAID.

Tax obligations are not discharged until paid and the vehicle to collect tax obligations originally omitted is the escaped property statute. Its purpose is to allow for the correction of the omission of taxing officers in previous years. "No statute of limitations runs against the state, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of a taxpayer's obligation. The owner of taxable property omitted from the tax rolls becomes liable for the

tax thereon at the time the property ought to have been placed upon the rolls, and this liability continues until the tax is discharged by payment. The completion of the tax roll for a given year creates no vested right in the owners of property subject to taxation that the assessment shall not thereafter be modified or amended to their detriment. The legislature may constitutionally provide for the assessment of previously omitted property as well as for the revaluation of property previously assessed." State and Local Taxation, 72 Am Jur.2d §788 (citations omitted).

The purpose of the escaped property statute as noted above must be viewed against the backdrop of public policy and the necessity for the collection of tax revenue. In Robinson v. Hansen, 282 P. 782 (Utah 1929), this policy and interest were articulated as follows:

> It is a recognized principle of law that taxes for general government purposes, lawfully imposed by the state, are paramount to all other demands against the taxpayer, although the statute imposing the tax does not expressly declare such priority. This rule rests upon public policy and necessity. Civil government cannot exist or be maintained without revenues, and taxes levied by the state for its support are founded upon a higher obligation than other demands. It is essential to the dignity and power of the sovereign state that taxes levied by it be promptly collected without fail.

Id., 282 P. at 783

Notwithstanding the foregoing, the Appellee posits the general rule that the County cannot retroactively collect additional taxes. The first case it cites is Crystal Car Line v. State Tax Commission, 174 P.2d 984, 987 (Utah 1946). The issue was whether

it was proper to assess railroad cars as personal property and to enforce collection through seizure and sale of the property as provided under the laws then in effect. The case has no application to escaped assessments or unlawfully received tax exemptions.

The second case relied on is County Board of Equalization v. State Tax Commission, ex.rel. Sunkist Service Co., 789 P.2d 291, 293 (Utah 1990), for the general rule that "where a valid assessment has been made by an assessor cognizant of the facts, undervaluation is ordinarily not a ground for another assessment." This rule actually proves Appellants' point. Since a valid assessment was not made when Appellee's commercial property received a residential exemption Sunkist allows collection as an escaped assessment. The assessor was not aware of the error in assessment until 1990.

Finally, First Security unashamedly admits it is not entitled to a residential exemption but it is nevertheless entitled to a tax refund for the mistakenly received exemption. The rule which First Security urges this Court to adopt is "when such an exemption was applied to the property through no fault of the taxpayer, and the assessed taxes were paid, the County is precluded from going back in later years to collect additional money." Appellee's Brief, p.9. If adopted, this rule would extend beyond assessment errors related to exemptions. It effectively would mean that once the tax is paid, any assessment error which is to the taxpayer's benefit cannot be collected as an escaped assessment.

To adopt this rule of law, would require the Court to overrule Sunkist and would effectively eviscerate the escaped property statute.

Finally, the parties each contend that the rules of statutory construction favor it. The County contends that since Appellee is essentially seeking a property tax exemption it should first show its entitlement and the escaped property statute should be construed against the taxpayer seeking an exemption from taxation. The Appellee takes the opposite stance and cites County Board of Equalization v. Nupetco Associates, 779 P.2d 1138 (Utah 1989), quoting from Builders Components Supply Co. v. Cockayne, 450 P.2d 97, 99 (Utah 1969), to support is position. In Cockayne the Court upheld an escaped assessment totalling $3,141.52 against a corporation even though $269.26 in taxes had originally been assessed against the corporation's president and had been paid. While arguing the escaped property statute must be construed favorably to the taxpayer, Appellee quotes only a portion of the Cockayne decision and omits the language construing the escaped property statute favorably to the taxing entity. The full text is as follows:

> We have made the observations in this opinion and have arrived at our conclusion in awareness that statutes imposing taxes and prescribing tax procedures should generally be construed favorably to the taxpayer and strictly against the taxing authority. Such rules, though salutary in proper circumstances, should not be so applied as to defeat or obstruct the correct operation and the application of taxing procedures. The payment of taxes is burdensome. But the means of relief is not to be found in allowing some

> taxpayers to slip by without paying their fair share and thus putting an even greater burden on others.

As in Cockayne, the Court should not construe the escaped property statute so as to let First Security slip by without paying its fair share and putting an even greater burden on other taxpayers.

POINT II

THE PROPERTY ESCAPED ASSESSMENT.

Appellee's next argument is that the escaped property statute enacted in 1989 with an effective date of January 1, 1990, should apply retroactively to 1985 as opposed to the escaped property statute in effect during the years the property actually escaped assessment. The County utilized the statute in effect for the years subject to assessment i.e. 1985 through 1988. In doing so, the County acted consistently since it used the tax rates in effect for those years as opposed to the 1990 tax rates.

Retroactive legislation are "acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act." Sutherland, Statutory Construction, Sands 4th Ed., Vol. 2, §41.01. Retroactive legislation is generally disfavored and is not to be construed as retroactive unless the legislature expressly provides for it.

> Retrospective operation is not favored by the Courts, however, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates the legislature intended a retroactive application.

Id., §41.04 at 348.

In this instance the escaped property statute expressly provided the effective date of the act as January 1, 1990. Other evidence it was not intended to apply retroactively is that the version of §59-2-309 which became effective on January 1, 1990, did not repeal the escaped property statute (§59-2-309) in effect prior thereto. "Failure of an act to repeal a prior statutory provision on the same subject is evidence of a legislative purpose that the new act not apply retroactively," Id., §41.04 at 350.

Finally, it is fair to Appellee to apply the 1989 version of the escaped property statute since it would have undoubtedly applied if the assessment error had been noticed and asserted in 1989 as opposed to one year later.

The County has drawn the Court's attention to the case of General Dynamics Corp. v. County of San Diego, 166 Cal. Rptr. 310 (Cal. Ct. App. 1980) for the general rule that "an escaped assessment is levied according to the laws existing in the fiscal year in which the under-assessment occurred," Id., at 314. Appellee asserts the County "misread" the case but then admits the Court refused to apply a law which became effective in 1974 to an escaped assessment made in 1974 for tax year 1972. It applied the law in effect in 1972. Instead of distinguishing the case the Appellee's argument illustrates the factual and legal similarity between General Dynamics and this matter. Further, the County relied on General Dynamics as authority for the rule that the constitutional requirements of uniformity and equality in assessments provide authority to collect the tax if the escaped property statute does not.

There is no Utah Supreme Court case on point, i.e. whether a mistakenly applied exemption can be collected as an escaped assessment. However, Appellee argues that even if the 1990 version of the escaped property statute does not apply, under the law as decided in the case of County Board of Equalization v. Nupetco Associates, 779 P.2d 1138 (Utah 1989), the property is not subject to escaped assessment. The language of the Court is instructive in determining whether property has escaped assessment or is merely undervalued. It stated as follows:

> The mistake in the acreage figure resulted in an undervaluation of the assessed property, not in an escape from assessment within the meaning of the statute. The property was assessed, albeit inaccurately. The statute does not permit retroactive correction of mistaken valuations after the tax has been paid.

Id., 779 P.2d at 1139.

From Nupetco and Sunkist two rules emerge. First, if property is undervalued the escaped assessment statute can not be used to alter the valuation. Secondly, improvements which are completely omitted from assessment can be assessed retroactively as an escaped assessment. Neither of these cases are directly on point. The property wasn't undervalued because the full market value is reflected on the tax notice and the improvements have not been omitted or even under assessed.

Since neither of the foregoing cases address this factual situation, neither would be overruled if this Court finds in favor of Appellants. Because Utah hasn't decided this issue, Appellants

have cited decisions from other jurisdictions which upheld the use of escaped assessment statutes to collect a tax attributable to an improperly received exemption.

Appellees attempt to distinguish the cases cited by the County ignores certain underlying premises of each. Like the matter before this Court, Freightliner Corp. v. Department of Revenue, 549 P.2d 662 (Ore. 1976) and Cherry Hill Industrial Properties v. Township of Voorhees, 452 A.2d 673 (N.J. Super. Ct. App. Dir. 1982) addressed whether escaped or omitted property statutes could be used to collect additional taxes due to a mistakenly allowed property tax exemption.

Both Freightliner and Cherry Hill held that property which is not legally entitled to a tax exemption, is subject to retroactive collection of the tax attributable to the exemption. Appellee considers Freightliner distinguishable because Oregon's omitted property statute recognized that property which has been omitted in part may be assessed as an escaped assessment. An argument can be made that Appellee's property was wholly omitted because it was assessed as residential property instead of as commercial property. In other words, a mistaken residential exemption doesn't constitute a partial omission of assessment but rather a complete omission of assessment of the property's status under law.

Also, Appellee attempts to distinguish Cherry Hill Industrial Properties primarily on the grounds the taxpayer failed to file required forms to qualify for the exemption and hence under Utah's 1990 version of the escaped property statute the property would be subject to retroactive tax collection. Nothing in Cherry Hill

suggests that New Jersey had such a provision so as to allow for the escaped assessment. In fact, the very argument asserted by Appellee that property can't be subject to escaped assessment unless it is wholly omitted was rejected by the Court. In both General Dynamics and Cherry Hill Indus. Properties the Court held that exemptions which resulted in underassessment could be withdrawn and retroactively assessed.

Also, Sunkist doesn't stand for the broad proposition Appellee asserts, i.e. that underassessed property can't be subject to escaped assessment since the Court's reference to underassessment was dicta. This is apparent from Kennecott Copper Corp. v. Salt Lake County, 799 P.2d 1162 (Utah 1990), decided in pari materia with Sunkist. The County argued it could assert an escaped assessment against Kennecott's property because the method for valuing the property resulted in an unconstitutional underassessment. Although not deciding the issue because the facts were not before it, the Court's statement is instructive in the proper interpretation of Sunkist:

> To justify a reassessment under §59-5-17, the County must be able to show that unassessed or underassessed property 'escaped assessment' and was not just 'undervalued'.
>
> * * *
>
> The specific facts of this case, when proved, may be determinative of whether an incorrect assessment, ...results in an undervaluation or an escaped assessment. (emphasis added)

Id., 799 P.2d at 1162-63.

What the Court has distinguished in the foregoing is the difference in undervaluation of property and property which is

unassessed or underassessed. Undervaluation of property is not to be corrected as an escaped assessment; but property which is unassessed or underassessed may be so corrected.

POINT III

THE CONSTITUTION MANDATES CORRECTION OF THE ERROR IN ASSESSMENT.

First Security admits that if the legislature had passed a law which gave it the residential exemption the law would be unconstitutional. Appellee's Brief, p. 21. Because the foregoing premise is accepted one must conclude the County's assessment was a de facto violation of the constitution.

This position presents the anomalous situation that although the assessment violates the constitution, the Appellee contends the escaped property statute nonetheless bars correction of the unconstitutional assessment. However, under the authority of Salt Lake County v. Tax Commission of the State of Utah, 780 P.2d 1231 (Utah 1989), if the escaped property statute is applied to bar the correction of an unconstitutional assessment, such an application would be unconstitutional.

Appellee further argues that Nupetco would be overruled if the Appellants' argument is accepted. However, Nupetco did not present an assessment error wherein commercial property was de facto classified as residential property. Further, accepting the County's argument does not mean that the escaped property statute is unconstitutional "because it limits retroactive assessment to just five years". Appellee's Brief, p. 21. The escaped property statute is constitutional on its face and in fact promotes equality

and uniformity if applied to correct assessment errors. But when an error occurs, which effectively creates a misclassification of property, application of the escaped property statute to bar correction of the classification error is unconstitutional.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the decision of the Trial Court and enter judgment for Appellants.

DATED this 6 day of January, 1993.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the Reply Brief of Appellants to the following, postage prepaid this 6 day of Jan, 1992.

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